United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1559

B
P/S

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

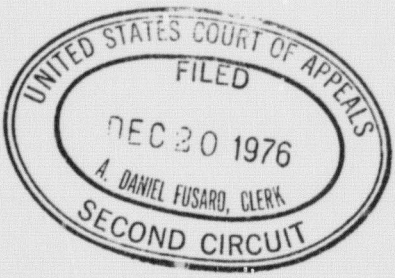
v.

ROBERT MICHAELSON,

Appellant.

On Appeal From The United States District Court For The Eastern District Of New York

APPELLANT'S BRIEF



BARRY IVAN SLOTNICK
Attorney for Appellant
233 Broadway
New York, N.Y. 10007
(212) 964-3200

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1559

UNITED STATES OF AMERICA,

Appellee.

v.

ROBERT MICHAELSON,

Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal by appellant ROBERT MICHAELSON from a judgment of conviction entered in the United States District Court for the Eastern District of New York after a plea of guilty (Kevin T. Duffy, U.S.D.J.) on September 22, 1976.

Appellant plead guilty to one count of aiding and abetting the making of a fraudulent statement to a government agency, *i.e.*, United States Department of State, in violation of 18 USC §1001 and 2.

Appellant moved to withdraw the plea on November 11, 1976, prior to sentence. The motion was denied from the bench and Appellant was sentenced to 5 years imprisonment.

STATEMENT OF FACTS

The appellant, Robert Michaelson, a food broker and president of Wittington Imports, Ltd. alleged to the Court below that he was indicted as a result of the following fact pattern:

That during the month of March, 1976, he received a copy of an arms list due to the fact that a contingent salesman in his office was attempting to insure a finder's

fee for himself (not Michaelson) with regard to a legitimate arms deal. The contract protecting the other party, together with an arms list, was forwarded to Michaelson's office. The aforementioned papers were placed on Michaelson's desk and subsequently removed therefrom by one James Gray.[1] Gray apparently gave the list (without Michaelson's knowledge or consent) to one Vince Coppolla, who was acting as a Government agent. Coppolla called Michaelson on several occasions with regard to the list — all to which Michaelson indicated that he was not in the arms business and did not with to transact that business with Coppolla. Coppolla informed Michaelson that his cousin "Tony" was interested in purchasing the arms. Michaelson refused. On or about March 19, 1976, Coppolla called and once again implored Michaelson to speak to his counsel "Tony."[2] Tony got on the phone and told Michaelson in a gruff and threatening tone that he wanted to see him.[3] Michaelson (not knowing that he was receiving calls from Government agents — but being given the impression that these were Mafia criminals), tried to avoid the meeting, but was told by "Tony" that it would not be advisable for him not to meet with him.

---

1. An employee of Michaelson's firm.

2. Tony Stagg was a Government informer, who at this time was working directly with Alcohol, Tobacco and Firearms Agents.

3. It is interesting to note that this conversation was not taped, especially in view of the fact that most everything else in this case was. Material received subsequent to Michaelson's plea indicated that Tony Stagg had been accused in the past of losing tape recordings. It is further mentioned that the transcripts of recordings commence with "Tape II" — perhaps indicating the necessary missing taped phone conversation of March 19, 1976.

On the following day, Michaelson travelled to Westchester County and was met by Vince Coppolla, who warned him in a non-taped conversation that he was going to meet his cousin who was a high-ranking member of the Mafia and that Michaelson should not only remember his own safety but be concerned about that of his wife and children.

The meeting at Mt. Kisco on March 20, 1976, was taped and is available for the Court's listening. A listening to the tape recordings clearly indicate that not only was Michaelson intimidated but he was also put in fear of his life by innuendoes that referred to "people being left in the desert" and also Stagg's alleged role in the Mafia.[4]

The tape recordings clearly establish that Michaelson made continual attempts to leave this conspiracy but was continuously put into this case by the psychological pressures that were put upon him as a result of the Mafia portrayals by the Government. In truth and in fact, all of the alleged purchasers of weapons in this case were Government agents. It is contended that the entire scheme to purchase guns came from "Tony" Stagg and company rather than from Michaelson and company. In fact, a clear listening to all the tape recordings should not only cause this Court to have great sympathy and pity for the intimidated appellant but should also clearly convince this Court that Michaelson not only was entrapped but he was also coerced with the constant innuendoes that put him in fear of his life and also for the safety of his family.

Appellant was indicted, along with six others on March 25, 1976, for conspiracy to violate sections of the Gun Control Act of 1968 [26 USC §§5811, 5812, 5861(d) and (e)] and for making false statements to a government

---

4. It is urged upon the Court that they listen to the tape of March 20, 1976, to indicate how a Nassau County businessman was frightened to death and forced to enter into a situation he had never been in before—*i.e.*, selling of arms.

agency [18 USC §§1001 and 2], along with three substantive counts alleging violations of 18 USC §§1001 and 2.

Prior to jury selection Appellant's counsel announced to the Court and the prosecution that Appellant's defense would be that of entrapment.[5] (See also Defendant's proposed Voir dire, points 4 and 5-8 at A14-15].[6]

On the morning of September 22nd, 1976, counsel informed the trial court that Appellant wished to change his plea of not guilty to one of guilty to Count Four of the indictment, so as to cover the indictment. [A-19].

The Court then began the allocution necessary to take the plea. During the taking of the plea it remained clear that not only was appellant pleading for "*Alford*-type" reasons, but that, in fact, he retained his belief in his innocence and was not cognizant of any guilt on his part. Moreover, appellant still proferred the Court his previously stated defense of entrapment through coercion:

> "THE COURT: As to the Fourth Count of the indictment, how do you plead, guilty or not guilty?
>
> DEFENDANT MICHAELSON: Guilty, sir.
>
> THE COURT: Did anyone make any threats or promises to you in connection with this ——" [A-20]

Here, appellant misunderstands the time-frame of the Court and believes they are referring to the time when the incidents occurred:

> "DEFENDANT MICHAELSON: At the time that I —
>
> THE COURT: No, No; now, in connection with this plea.
>
> DEFENDANT MICHAELSON: No, sir." [A-21]

---

5. Specifically, on the morning of jury selection, counsel stated that the Appellant's defense would be based on Government entrapment. He further indicated that the defense of entrapment was not a "surprise" to anyone. Appellant alleged he was scared to death, *i.e.*, informants and Government agents thus causing him to go along with the scheme.

6. "A" refers to page number of Appellant's Appendix.

In response to the general question by Judge Duffy "Tell me what went on with this [crime]" [A21], *appellant related the facts consistently in terms of coerced inducement causing continued involvement:*

> "DEFENDANT MICHAELSON: *I was induced* to attend the first meeting.
>
> THE COURT: And you did?
>
> DEFENDANT MICHAELSON: And I did, Yes. I attended the first meeting. I was then *induced* to attend a second meeting.
>
> THE COURT: Yes, I want to hear exactly what went on.
>
> DEFENDANT MICHAELSON: Then *induced* to go to a second meeting. I attended the second meeting.
>
> After the second meeting, I felt I was — I don't want to use the word *'entrapped'*, I just felt I was in this thing. *I couldn't get out anymore.* I was never in trouble in my life." [A-22] [Emphasis ours]

Since the appellant plead guilty to aiding and abetting the making of a false statement, the Court found it necessary to tailor further allocution towards that end, in order to justify the "basis in fact" requirements of Rule 11:

> "THE COURT: Did you know that somebody was going to file a statement in connection with the guns involved?
>
> DEFENDANT MICHAELSON: There were discussions at the meetings, sir, yes, that there had to be a purchase order filed.
>
> THE COURT: You knew about it at the time?
>
> DEFENDANT MICHAELSON: When the purchase order was filed, I knew about it, yes, sir." [A-22]

The Court then asked both appellant's counsel and counsel for the Government whether they knew of any

reason not to accept the plea. Both replied in the negative. The response of appellant's counsel indicates the *Alford* nature of the plea ("in the best interests of the defendant"). [A-23]

The Court then decided that the plea was knowing and voluntary and had a basis in fact.[7]

It is worthwhile to note that immediately *after* the Court accepted the plea, "finding the basis in fact," the appellant made his only mention of any physical act in actually participating in the making of the false statement:

> "DEFENDANT MICHAELSON: May I make one statement? I don't know if it is — at the time of the purchase order, *I was afraid, sir,* not to sign it, but I knew I could have gone to the authorities. I acted stupidly. I should have gone to the authorities." [A-24]

At the end of the proceedings, the Court granted the appellant the right to request and receive additional time to prepare a sentencing memorandum if counsel found material in the presentencing report with which he disagreed and which needed further investigation. [A-24] Counsel for the appellant informed the Court that it was appellant's intention to offer an extensive sentencing memorandum. [A25-26]

As part of the plea bargain, the Government agreed not to take any position as to sentence, and merely relate the facts of the case. Affidavit, James A. Moss, In Response to Motion to Withdraw, point 3. [A-51]

On November 18, 1976, appellant hand-delivered a letter [A-29] to Judge Duffy requesting additional time to prepare a sentencing memorandum and refute the allegations in the pre-sentencing report. The pre-sentence report had been made available to counsel only 3-1/2 days previous and had contained unexpected allegations of culpability. [A-40, points 4 and 5] The Court, however, denied the request and the sentencing went forward.

7/ At no time was guilt elicited.

On the date of sentencing, only two months since the taking of the plea, appellant moved on formal papers [A-32-49] for permission to withdraw his plea pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure (F.R.Cr.P.) on the grounds that a government agent pretending to be a "Mafia" figure had frightened him into the commission of the crime and that he was innocent and had always maintained his innocence; that the Government had violated its plea bargain by taking a position as to sentencing in the presentence report; that evidence was withheld by the Government which corroborated appellant's constant claim that he had been coerced and entrapped into the events surrounding the crime; and that the Government had failed to provide that explosive exculpatory material to the appellant prior to pleading.[8] Michaelson Affidavit [A53-58]. Counsel for appellant then outlined to the Court the divers legal theories which required an order allowing the withdrawal. Appellant alleged that there was no factual basis for the taking of the plea (FRCrP Rule 11) that the Government violated the plea bargain; that he could not properly, in time, respond to the presentence report in spite of the Court's assurance that adequate time to respond would be granted; and that the Government failed to provide all exculpatory material. [A39-41].

In response the Government alleged that it had not breached its bargain; that the defense of entrapment was not sufficient to allow withdrawal of the plea; and that the plea of guilty was made knowingly and voluntarily. [A-50-53].

The Court denied the motion. Again, prior to the imposition of sentence, after counsel had outlined the nature of coercion and inducement worked upon appellant [A55

8. Motion for *Brady* material made and consented to 9/13/76.

-63], the appellant still remained consistent in his belief that he was entrapped:

> "THE COURT: Mr. Michaelson, do you want to be heard?
> DEFENDANT MICHAELSON: I lived in that fear. That's all" [A-63]

In the closing moments of the sentencing, appellant's counsel requested bail pending appeal in the light of the motions made. The Court denied that application in finding the motions totally without substance. [A-64]. An endorsed denial was filed on November 23, 1976. The motion being denied as of November 22, 1976, with a reference to the transcript.

The withdrawal motion to the District Court once again "maintained [that] I was acting under fear. This fear was instilled by Government Agents who were posing as underworld hoodlums and caused my total involvement." [A-33]. Appellant went on to reaffirm that he "state(s) clearly and without equivocation that I entered this scenario under fear, and that it was this fear for the lives of myself and my loved ones which kept me in the alleged conspiracy. This is what I stated to the Court at the time I took the plea—and I reaffirm it now". [A-34]. Applicant then went on to outline the whole bizarre turn of events which led to his indictment. Most of these factual matters had never seen the light of day, as the trial of appellant's co-defendants was a truncated one where the defense chose not to present a single witness at the close of the Government's case.—And the Government did not present it's main witnesses "Tony" Stagot or Vince Coppolla.

The exculpatory post-pleading material discovered by the defendant showed that "Tony" Stagg was not only a true life gangster—but one who was working with the government in making cases. Stagg and company frivolously referred to themselves as the "Little Theatre Group."

ARGUMENT

Introduction

In limiting the scope of argument, the issues presented deal with only the nature and rationale of a pre-sentencing withdrawal of a plea of guilty, under FRCrP 32(d). While any number of courts and writers will readily admit that the rule presents, at best, an amorphous standard in such circumstances, the Court's examination should be further channeled towards a set of facts such as are present here, *i.e.* where the defendant continues to assert his innocence (even during the taking of the plea); where the Government fails to allege below that any prejudice will result; where there is an indication that a plea bargain agreement has been breached; where the defendant has had inadequate time to prepare a sentencing memorandum (though the trial judge promised such time); and where newly received evidence allows the interpretation that defendant's plea was garnered through, at least partial, trick and surprise. In addition, this Court will be asked to take note of the fact that the Court below knew of a valid legal defense which it should have known the jury had a right to hear and that appellant's motion was denied out of hand, without even a hearing on the factual matters lying unresolved within.

Even under the most stringent interpretations of the standard for pre-sentence withdrawals, appellant under the circumstances herein was entitled to present his case to a jury of his peers and seek their determination as to his guilt or innocence. The withdrawal should have been permitted and counsel candidly suggests the plea should never have been entered.

I

PRIOR TO SENTENCE, THE APPELLANT HEREIN SHOULD HAVE BEEN ALLOWED TO WITHDRAW HIS PLEA OF GUILTY.UNDER THE APPLICABLE STANDARD.

While Rule 32(d) of the FRCrP allows the making of the motion to withdraw a plea of guilty prior to sentencing, it does not offer any standard for guiding trial courts on the use of that discretionary right.[9] *United States v. Barker*, 168 U.S. App. DC 312 514 F.2d. 208, 218 (D.C. 1975) cert. den. 421 U.S. 1013, 95 S.Ct. 2420, 44 L.Ed. 2d 682.

The Supreme Court in *Kercheval v. United States* [274 U.S. 220, 71 L.Ed. 1009, 47 S.Ct. 582 (1927)] offered that such a withdrawal should be allowed "if for any reason the granting of the privilege seems fair and just." 274 U.S. at 224. While this is far from being a guideline, the "fair and just" test has been echoed repeatedly, most recently by the American Bar Association Standards Relating to Pleas of Guilty:

> "Before sentence the Court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea." *ABA Standards Relating to Pleas of Guilty*, §2.1(b).

The "fair and just" test has been widely utilized, see *e.g. Gearhart v. United States*, 106 U.S. App DC 270, 272, F.2d. 499 (1959), though little understood. *See United States v. Stayton*, 408 F. 2d. 559 (3rd Cir., 1969). The need for Supreme Court clarification has been duly noted. *Neely v. Pennsylvania*, 411 U.S. 954 (1973); *See, generally*, Note, *Presentence Withdrawal of Guilty Pleas in the Federal Courts*, 40 N.Y.U.L. Rev 759 (1965).

---

9. Rule 32(d) does offer the "manifest injustice" standard, but that is to be used solely for withdrawal *after* sentencing.

All this has been implied to read that pre-sentence Rule 32(d) motions are to be read with great liberality. *United States v. Giuliano*, 348 F. 2d. 217, 221 (2d Cir., 1965); *Kadwell v. United States*, 315 F. 2d 667 (9th Cir., 1963); *Gearhart v. United States*, *supra*; *United States v. Tabory*, 462 F. 2d 352 (4th Cir., 1972); *United States v. Stayton*, *supra* at 560; *United States ex. rel. Culbreath v. Rundle*, 466 F. 2d 730 (3rd Cir., 1972).

A fascinating analysis on the subject and the standard by Mr. Justice Douglas appears in *Neely v. Pennsylvania*, *supra*, at 975; [Dissenting on the denial of certiorari, and with Justices Stewart and Marshall concurring in that dissent he argued that since a plea of guilty waives certain fundamental rights, *i.e.* right to a jury trial (citing *Duncan v. Louisiana*, 391 U.S. 145), the right to confront one's accusers (citing *Pointer v. Texas*, 380 U.S. 400), the right to remain silent (citing *Malloy v. Hogan*, 378 U.S. 1) and the right to be convicted by proof beyond reasonable doubt (citing *In Re Winship*, 397 U.S. 358) that the Court had "[i]n short, . . . recognized a 'right not to plead guilty.' *United States v. Jackson*, 390 U.S. 570, 581". 411 U.S. at 957.

In *Neely*, the Court below (the Supreme Court of the State of Pennsylvania) had felt that a pre-sentence withdrawal motion should be granted only in unusual circumstances. 449 Pa. 3, 295 A.2d 75. Mr. Justice Douglas vehemently disagreed: "I would hold, instead, that 'where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and . . . after judgement [*Santobello v. New Jersey*, 404 U.S. 257, 267-268; *see also*, *Duke v. Warden*, 406 U.S. 250, 257]" 411 U.S. at 957.

For a plea of guilty to survive constitutional examination it could not be allowed to stand where the defendant, in good faith, wished to exercise his right to trial:

> "I cannot accept a concept of irrevocable waiver of constitutional rights, at least where the Government will not suffer substantial prejudice in restoring those rights. The criminal process is not a contest where the Government's success is necessarily measured by the number of convictions it obtains, regardless of the methods used. A conviction after trial accords with Due Process only if it is based upon a full and fair presentation of all the relevant evidence which bears upon the guilt of the defendant.
>
> ***
>
> Similarly, a guilty plea should not be a trap for the unwary or unwilling. We should not countenance the 'easy way out' for the State merely because it has induced a guilty plea through a plea bargain.
>
> ***
>
> [T]he mere interest of the Government in avoiding a full-blown trial cannot outweigh the interests of the defendant, when he asserts sufficient reasons, valid on their face for withdrawing a guilty plea." 411 U.S. at 958.

See, also *Presentence Withdrawal of Guilty Pleas in the Federal Courts, supra* at 769, (supporting an absolute right to withdraw a plea of guilty prior to sentencing).[10]

What appears to emerge from a reading of the cases and an analysis of the factual applications of the standard is that a court will grant the motion so long as it remains factually unopposed. That is to say, the motion itself—the mere request—would not be sufficient to garner permission to withdraw. There must be either additional factors on the defendant's side or a *lack* of opposing factors on the Government's side.[11]

---

10. This Court has clearly stated that in this Circuit, however, no such "absolute right" is recognized. *United States v. Giuliano, supra,* at 221; see also, *Nagelburg v. United States,* 377 U.S. 266, 84 S.Ct. 1252, 12 L.Ed. 2d 290 (1964).

11. Clearly, this is consistent with the oft-repeated recognition of the initial burden on the motion being the defendant's. *United States v. Smiley,* 322 F.2d 248 (2d Cir. 1963); 2 *Wharton's Criminal Procedure* (2d Ed. — Torcia) §340.

Simply put, the defendant may withdraw his plea of guilty prior to sentencing when he has good reason to do so and the Government has proffered no (or insufficient) reason not to allow it. *Nagelburg v. United States, supra; Kercheval v. United States, supra,* at 224; *Gearhart v. United States, supra* at 502; *Everett v. United States,* 336 F.2d 979 (D.C., 1964) [Wright, dissenting].

II.

ANALYSIS OF THE FACTS IN RELATION TO THE STANDARD AND ITS PRECEDENT INDICATES THE COURT BELOW ABUSED ITS DISCRETION IN NOT GRANTING APPELLANT'S MOTION TO WITHDRAW

Through usage, there have been certain situations forged out where most appellate courts can argue that to deny the motion under 32(d) before sentence is an abuse of discretion. There are sufficient numbers and combinations of these in the case at bar to make the action of the District Court reversible.

Initially, one notes that the Government had failed to allege and agree below that any prejudice would enure to the United States by allowing the defendant to withdraw his plea. Such an allegation must be made at the District Court level. *Neely v. Pennsylvania, supra,* at 959. Moreover, the United States Attorney would have to show that the Government suffered serious impairment to its ability to maintain a prosecution. *Id.*

Prejudice must be shown by the Government, or, under the standard, the defendant's good faith motion must be granted. "If the government can show *substantial prejudice,* then the motion in the trial court's discretion, may be denied." *United States v. Stayton, supra* at 561; *Cf. People v. Parker,* 24 App. Div. 2d 610, 262 NYS 2d 395 (1965) [construing NY Criminal Procedure Law §220.60(3)].

It is recognized that the Second Circuit generally requires the defendant to proclaim his innocence on the

motion for withdrawal. *Welton v. United States*, 313 F. Supp. 729, aff'd 439 F.2d 824, cert. den. 404 US 859, 92 S.Ct. 157, 30 L.Ed. 2d 102. In the case at bar, appellant has continued to protest his innocence, even during the taking of the plea. Assertion of legal innocence is an important factor to be weighed. *United States v. Barker, supra* at 220.

Next, courts consider whether the court knew of a valid defense which the jury should have heard. The court below, privy to numerous conferences at the bench and the filing of Proposed Voir Dire and memoranda, knew that appellant's defense was entrapment and coercion. The Court was not required to determine guilt or innocence, but merely whether the issue deserved to be heard. The District Court should not decide the merits of the proferred defense. *Gearhart v. United States, supra*, at 502; *United States v. Joslin*, 434 F.2d 526 (D.C. Cir. 1970) ["If the request was made because appellant thought he had a defense, permission to withdraw 'should be rather freely granted.' *High v. United States*, 110 U.S. App. D.C. 25, 29, 288 F.2d 427, 430-431, cert. den. 366 U.S. 923, 81 S.Ct. 1350, 6 L.Ed. 2d 383 (1961)' " at 531]; *United States v. Barker, supra; Kadwell v. United States, supra; Poole v. United States*, 102 U.S. App. D.C. 71, 250 F.2d 396 (1957). Where the defendant has a defense that the jury should hear, it is an abuse of discretion to deny them that right. *United States v. Pisacano*, 459 F.2d 259, 262 (2d Cir, 1972) [Friendly]. As Judge Wilkey said, dissenting on the factual analysis of the Watergate "foot-soldiers" case, *United States v. Barker*:

> "Thus, I conclude that the appellants have presented a valid defense to the charges against them. As the Government presented no compelling reason why the appellants' presentence withdrawal motion should be denied, I would find the District Court abused its discretion under the 'fair and just' standard. I would direct the District Court to grant the motion and proceed with trial on the merits." *supra*, at 270.

To some extent, courts have looked to the passage of time between the plea of guilty and the presentence Rule 32(d) motion. *United States v. Barker, supra* at 222. Frequently, this is in terms of assessing possible prejudice to the Government. *Id.*, citing, *inter alia, United States v. Lombardozzi*, 436 F 2d 878 (2d Cir.) cert. den. 402 U.S. 908, 91 S.Ct. 1379, 28 L.Ed. 2d 648 (1971). The two month time span here is short enough to, even if there were a Government allegation of prejudice, remove the delay issue from any larger prejudice argument.

The actions of the United States Attorney with reference to the presentence report were improper and constituted a breach of the bargain upon which the appellant based his plea. While the Government promised not to take a position at the sentencing, they accomplished this end by informing the agency which prepared the presentence report that they viewed appellant as *the* most culpable of his co-defendants. Further, the constant use of characterizing words so poisoned the simple statement of facts, that the end result was to indicate to the sentencing judge that among all the defendants in this case, *appellant* was to get the stiffest sentence. Under any one of a plethora of on-point decisions, such action on the part of the Government would mandate the granting of appellant's motion. *Santobello v. New York, supra; ABA Standards, supra*, §2.1(a)(4)(5).

Additionally, on the topic of the presentence report, the actions of the District Court in refusing the appellant sufficient time to respond to the voluminous evidence needed to show his side of the story was equally violative. This Court recognized in *United States v. Robin*, ——— F.2d ——— (2d Cir., 1976) (Slip Op. No. 951, October 15, 1976)| that "a defendant must be given adequate time to prepare and present a rebuttal to information which he contests" in a presentence report. Slip Op. at 5837, citing *United States v. Rosner*, 485 F.2d 1213 (2d Cir. 1973). In *Rosner*, the defendant was shown the presentence report the morning of the sentencing. In the case at bar, the same event took place only 3-1/2 days prior to sentencing. This Court held that no matter how well-meaning, defense

counsel's attempt to rebut at sentencing was not adequate. *Id.* Much like in *Robins*, there was no trial here. The trial of co-defendants, as hitherto described, was so truncated, that the Court below did not receive one-fifth of the testimony available to the appellant. Moreover here, unlike *Robins*, appellant's counsel *did* try to seek an adjournment of sentencing. Even more telling is that the extra time had been previously assured counsel by the sentencing judge.

Rule II

FRCrP Rule 11 requires, *inter alia*, that the Court taking the plea be satisfied that there is a factual basis for the plea. FRCrP Rule 11(f). Under the rationale of *McCarthy v. United States* [395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed. 2d 274 (1969)] the ritual of FRCrP Rule 11(c) and (d) is to be strictly complied with. Absent a showing of strict compliance, the failure to comply is prejudicial, *per se*. *See generally*, 8 *Moore's Federal Practice* ¶11.03[1](b).

As a matter of law, appellant's Rule 11 allocution could have no basis in fact. 18 USC §1001[12] requires that a defendant act "knowingly and willfully". At the taking of the plea, appellant merely said the following:

> "THE COURT: Did you know that somebody was going to file a statement in connection with the guns involved?
>
> DEFENDANT MICHAELSON: There were discussions at the meetings, sir, yes, that there had to be a purchase order filed.
>
> THE COURT: You knew about it at the time?
>
> DEFENDANT MICHAELSON: When the purchase order was filed, I knew about it, yes, sir."

---

12. §1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or use any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Appellant never stated that he took *any* action, much less "knowing" that it was criminal. Further, the portions of the allocution referred to heretofore (*infra*) leave no doubt that if there were actions taken by defendant, they were not done "wilfully". The statute, even when coupled with the "aider and abettor" qualification of 18 USC §2, requires something more than mere knowledge that an act is occurring. In the case at bar, we have even less than that, for there is no showing that even if defendant did have knowledge that the act was occurring that he knew it was couched in false or criminal terms.

Noteworthy additionally, is that the following mandatory advisement sections of Rule 11 were *not* complied with at the time the plea was taken: 11(c)(3) [defendant, at trial, would have the right to cross-examine witnesses against him; the right not to be compelled to incriminate himself]; 11(c)(4) [that by pleading he waives the right to trial]; 11(c)(5) [that he may be required to answer questions that can later be used against him]; 11(d) [whether defendant's plea is a result of a plea agreement]; 11(c)(2) [notice of plea agreement on record]; 11(e)(3) [acceptance by Court of plea agreement].

Failure of the Government to Turn over Brady Material

It is further emphasized that under the context of this case the Government should have turned over material discovered by the appellant during his post-plea time period which indicated that "Tony Stagg" was a viscious, ruthless gangster who was working in conjunction with the Government. It was discovered that this was not the first case where he was accused of entrapping people. It was further discovered that he was indicted for perjury and filing a false statement.

Furthermore, it was learned that Stagg indeed was a gangster who was involved in violent crimes. The material not turned over by the Government was most favorable to

the facts as portrayed by Michaelson. This failure to turn over material was sufficient to mandate that Michaelson did not enter a knowing plea of guilty. *United States v. Morrell.* ____F2d____ (2d Cir. 1976) (74-1827).

Hearing

At a minimum, the Court below should have granted a continuance and a hearing so that the ends of justice could be met. The unfortunate situation that Michaelson was placed in should not be condoned and his plea of guilty should not have been allowed to stand. *Gearhart, supra; United States v. Joslin, supra. cf People v. Sanders,* 36 App. Div. 2d 619 (1971); *People v. Klein,* 26 App. Div. 2d 559 (1966).

SUMMARY

In summary, the Government has not opposed the motion by showing any prejudice, and the appellant has forwarded a number of "good faith" reasons for allowing the withdrawal. In the light of these facts, it was an abuse of discretion for the Court below to deny the motion.

CONCLUSION

The determination of the Court below should be reversed, and the judgment of conviction vacated.

Respectfully submitted,

BARRY IVAN SLOTNICK
Attorney for Appellant
233 Broadway
New York, N.Y. 10007
(212) 964-3200

SLOTNICK

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 20 day of Dec. ,1976 at No. 225 Cadman Plaza East., Brooklyn, NY

deponent servied the within Brief upon U.S. Atty., East. Dist. of NY

the Appellee herein, by delivering true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the appellee therein.

Sworn to before me this
20 day of Dec. 1976.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978